SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1953

No. 115

KERN-LIMERICK, INC., AND
THE UNITED STATES OF AMERICA,
APPELLANTS

vs.

CARL F. PARKER, COMMISSIONER OF
REVENUES FOR THE STATE OF ARKANSAS,
APPELLEE

APPEAL FROM
SUPREME COURT OF ARKANSAS

BRIEF OF APPELLEE

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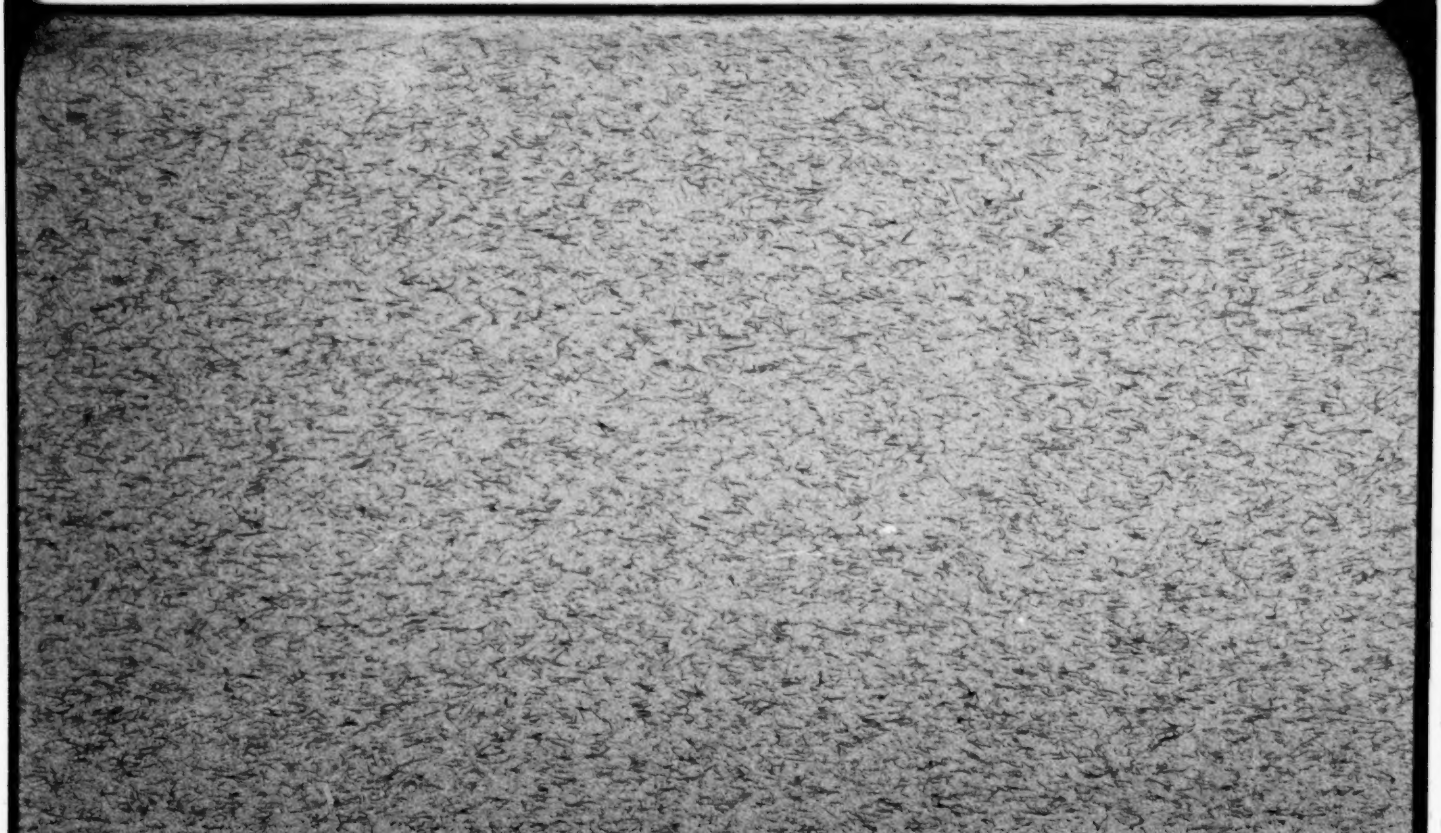

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STATEMENT OF CASE

Kern-Limerick, Inc., operate a retail sales establishment in Little Rock, Arkansas, and have a retailers' permit as provided by the Gross Receipts Tax Law of the State. As retailers they sold the machinery to the Contractors engaged by the Navy Department to construct certain structures at the Shumaker Ordnance Plant at Shumaker, Arkansas (near Camden). The four contractors associated themselves together, in the construction contracts under the name of W.H.M.S. The contractors purchased and paid for equipment and materials to be used in its construction project under the contract to the value of $17,146.66 entailing a Gross Receipts Tax liability of $342.93. The question of the amount is not involved. The question to be determined is: Were the purchases made by the contractors or by the United States?

If the purchases were made by the contractors, Kern-Limerick owes the tax. If the purchases were made by the United States, Kern-Limerick would not owe the tax. Kern-Limerick refused to pay the tax, and following the provisions of the Arkansas Gross Receipts Tax Law (Act 386 of 1941) requested a hearing before the Arkansas Revenue Commissioner, who held the tax due, and paying the tax under protest, filed its suit in the Pulaski Chancery Court, which Court held that the tax was not due. The Commissioner appealed to the Arkansas Supreme Court, which reversed the decree of the Pulaski Chancery Court. The United States intervened in the Chancery Court case, and with Kern-Limerick has appealed from the judgment of the Arkansas Supreme Court. The Appellee, Commissioner of Revenues of Arkansas, says that the purchases were made by the Contractor, under the requirements of the contract. He says further that the Armed Services Procurement Act, Title 41 U.S.C.A., Sections 151 to 159, does not authorize the Navy Department to delegate its authority contained in said Act, to a contractor to purchase materials in the name of the United States, and bind the United States for payment. Appellee says further, the contractors were bound under the contract to furnish materials and machinery, pay for same and file its receipted bills with the Government for reimbursement for such purchases. He says further, that the whole scheme of contending that the purchases were made by the Government, rather than by the contractors, was to defeat the State in its attempt to collect its Gross Receipts Tax.

ARGUMENT

* * *

Appellee's argument is outlined as follows:

1. Contractors are taxed as consumers and are not purchasers for resale.
2. Armed Services Procurement Act does not authorize delegation of purchasing power to contractors.
3. The contract with W.H.M.S. provides that the contractor and sub-contractors purchase and pay for all material needed to fulfill the contract.

I

Contractors in Arkansas Are Taxed as Consumers

Arkansas Statutes 1947, Annotated, Sec. 84-1902 (i) is as follows:

> "(i) Consumer-User: The term 'consumer' or 'user' means the person to whom the taxable sale is made, or to whom taxable services are furnished. All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies and equipment used or consumed by them in performing any contract and the sales of all such property to contractors are taxable sales within the meaning of this act (§84-1901—84-1904, 84-1906—84-1919)."

Also Section 84-1903 (a) * * * and the last paragraph (e) * * * we find the following:

> "84-1903 Two per cent tax levied.—There is hereby levied an excise tax of two (2%) per centum upon the gross proceeds or gross receipts derived

from all sales to any person subsequent to the effective date of this act (§84-1901—84-1906—84-1919), of the following:

(a) Tangible Personal Property.

(e) Sales of service and tangible personal property including materials, supplies and equipment made to contractors who use same in the performance of any contract are hereby declared to be sales to consumers or users, and not sales for resale. (Acts 1941, No. 386, §3, p. 1056; 1945, No. 64, §1, p. 142.)"

It would thus seem to be certain that contractors are liable for the tax when they make the purchases.

II

The Armed Services Procurement Act Does Not Authorize Delegation of Purchasing Power to Contractors

Title 41 U.S.C.A., Sec. 156 (a) and (b) is as follows:

"Determination and Decisions (a) Powers of Agency head; Finality; Delegation. Section 156 (a). The determinations and decisions provided in this chapter to be made by the agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this chapter, including the making of such determinations and decisions in his discretion and subject to his directions, to any other officer, or officers or officials of the agency."

"'Non-Delegable power; Delegation to Chief Procurement Officer Only'. Section 156 (b). The power of the agency head to make the determinations or decisions specified in paragraphs 12 to 16 of Section 151 (c) of this title and in Section 154 (a)

of this title shall not be delegable, and the power to make the determinations or decisions specified in paragraph (11) of Section 151 (c) of this title shall be delegable only to a chief officer responsible for procurement and only with respect to contracts which will not require the expenditure of more than $25,000."

"Assignment and Delegation of Joint Procurement Responsibilities by Agency Head; Limitations; Allocation of Appropriations. Section 159—'In order to facilitate the procurement of supplies and services by each agency for others and the joint procurement of supplies and services required by such agencies, subject to the limitations contained in Section 156 of this title, each agency head may make such assignments and delegations of procurement responsibilities within his agency as he may deem necessary or desirable, and the agency head or any of them by mutual agreement may make such assignments and delegations of procurement responsibilities within his agency as he may deem necessary or desirable, and the agency head or any of them by mutual agreement may make such assignments and delegations of procurement responsibilities from one agency to any other or to officers or civilian employees of any such agency, and may create such joint or combined offices to exercise such procurement responsibilities, as they may deem necessary or desirable. * * *'"

The authority to purchase supplies and materials under the Armed Services Procurement Act is in the main not different from the authority granted to the General Services Administration, as set out in Sections 251 to 257 of Title 41, Chapter 4 U.S.C.A. We here set out the sections dealing with the delegation of powers thereunder:

"Section 257. ADMINISTRATIVE DETERMINATIONS—
(a) Conclusiveness; Delegation of Powers.

The determinations and decisions provided in this chapter to be made by the Administrator or other agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this chapter, including the making of such determinations and decisions, in his discretion and subject to his directions, to any other officer or officers or officials of the agency.

"NON-DELEGABLE POWERS; POWERS DELEGABLE TO CERTAIN PERSONS—(b) The power of the agency head to make the determinations or decisions specified in paragraphs 11 and 12 of Section 252 (c) of this title and in Section 255 (a) of this title shall not be delegable, and the power to make the determinations or decisions specified in paragraph 10 of Section 252 (c) of this title shall be delegable only to chief officer responsible for procurement and only with respect to contracts which will not require the expenditure of more than $25,000. The power of the Administrator to make the delegations and determinations specified in Section 252 (a) of this title shall be delegable only to the Deputy Administrator or to the chief official of any principal organizational unit of the General Service Administration."

If the General Service Administration were to undertake to delegate its power to purchase to some contractor, would it not be violative of the above law? The Navy Department is authorized to purchase what it needs, and it is authorized to employ contractors as it needs, but the delegation of power to purchase, and to bind the United States, by any one, other than as designated in the Act is specifically prohibited by the Act, except as set out in the Act. And that is to some one "within his agency as he may deem necessary or desirable". The Act further provides that if the purchase is for more than $25,000 that

the power cannot be delegated to any one. Appellants here say they have delegated authority to purchase materials for construction project costing more than thirty million dollars. W.H.M.S. is not an officer of the Navy, nor of any other branch of the Armed Services.

Delegation of purchasing powers to any one not specifically authorized is forbidden. Delegation of power is limited to other agency heads, and in no instance is authority granted to delegate purchasing authority to a contractor or any other person not an officer of the agency, or some other agency. The Bureau of Yards and Docks of the Navy has simply sought to go beyond the authority granted to them in employing W.H.M.S. as a purchasing agent for the United States Government. They attempt to go even further, and designate in the contract with W.H.M.S. that their sub-contractors will be authorized to likewise be designated as purchasing agents for the Government. See paragraph (e) Article 8, page 10, printed record. It therefore means that the Prime Contractor, W.H.M.S., shall specify in each sub-contract let by them, that each sub-contractor shall act as a purchasing agent for the Government. It has been freely admitted by the Navy authorities, and by the attorney for the Government in his oral argument to the Arkansas Supreme Court that the attempt to constitute such contractors and sub-contractors as purchasing agents for the Government was to avoid the payment of Gross Receipts Tax. They not only violated the provisions of the Armed Services Procurement Act, but went out of their way to defraud the State of its tax money. See paragraph (a) page 53 of the printed record, as stated by the Arkansas Supreme Court. It was their effort to wire around the decision of this Court in the case of *Alabama* v. *King and Boozer*, 314 U.S. 1. The Arkansas Supreme Court held that their attempt to delegate W.H.M.S. with purchasing power or

designate them as purchasing agents, with their subcontractors, was ineffective under the decision of this Court in the King-Boozer case.

III

The Contract With W.H.M.S. Provides That the Contractors and Sub-Contractors Purchase and Pay for all Materials Needed to Fulfill the Contract

Article 10 (a) of the contract with W.H.M.S. is as follows:

> "COMPENSATION Article 10 (a) The Government in consideration of the strict performance by the Contractor of his covenants and agreements herein contained, shall pay to the Contractor the sum of the actual net cost, as hereinafter specified and supported by proper documents, paid by the Contractor in accordance with the provisions of this contract in the accomplishment of the work, plus the fixed-fee stated in Article 1 (b)." See page 117 of the printed record.

Article 8 (a) and (b) of the contract is as follows:

> "MATERIALS—PURCHASES Article 8 (a) Except where provision is otherwise made by the Officer-in-Charge, all materials, articles, supplies, and equipment required for the accomplishment of the work under this contract shall be furnished by the Contractor. The Contractor shall act as the purchasing agent of the government in effecting such procurement and the Government shall be directly liable to the vendors for the purchase price. The exercise of this agency is subject to the obtaining of approval in the instances and in the manner required by subparagraph (c) of this article. The Contractor shall negotiate and administer all such purchases and shall advance all payments therefor unless the Officer-in-Charge shall otherwise direct.

"(b) Title to all such materials, articles, supplies and equipment, the cost of which is reimbursable to the Contractor hereunder, shall pass directly from the vendor to the Government without vesting in the Contractor, and such title (except as to property to which the Government has obtained title at an earlier date) shall vest in the Government at the time payment is made therefor by the Government or by the Contractor or upon delivery thereof to the Government or the Contractor, whichever of said events shall first occur. This provision for passage of title shall not relieve the Contractor of any of its duties or obligations under this contract or constitute any waiver of the Government's right to absolute fulfillment of all of the terms hereof." See page 10 of the printed record.

The Contractors and sub-contractors are thus bound to "furnish" all materials and supplies necessary for the completion of the Ordnance Plant, pay for such materials, and furnish "proper documents, paid by contractor in accordance with the provisions of this contract". The obligations of the Contractor in this case is not different from the contract in the *King-Boozer* case. They were bound to furnish materials, pay for them, do the work, and upon showing proper proof be re-compensated for all such purchases, plus the fixed-fee provided for. The Supreme Court of Arkansas said in its findings, on that point as follows: "When the sale was finally made the tractors were paid for by W.H.M.S., delivered to the site of construction, and again checked and inspected by the agent. Only then, and after W.H.M.S. proved to the Government's satisfaction that the purchase price had been paid by W.H.M.S. to Kern-Limerick, Inc., did the Government reimburse W.H.M.S. We are convinced that this provision pledging the credit of the Government was not placed in the contract because of any necessity to further protect the interests of the Government, but for another purpose,

and may be considered redundant." See paragraph (a) page 53 of the printed record. On page 55 of the printed record, the Arkansas Supreme Court in determining the delegation of power as set out in Section 156 (a) and (b) of the Armed Services Procurement Act (Title 41 U.S.C.A., Section 156 (a)), said: "From the above we conclude that if power in this instance was delegable at all, it would be only to an officer or official of the Navy. Here the attempt was to delegate the power to W.H.M.S. It appears probable to us that the purchases here were to be made under paragraphs 12-16 of Section 151 (c), in which case there was no power to delegate, rather than under paragraph (10) as contended by appellees. Paragraph (10) designates "supplies and services for which it is impracticable to secure competition".

Kern-Limerick had contracted to furnish materials, pay for and construct a Thirty Million Dollar plant at Shumaker, Arkansas, and the only way they could receive pay therefor was to submit evidence that they had paid for the materials and that a certain part of the construction had been done, when the earned portion of their fee of $580,000 less 15% would be paid.

This suit is a test suit, and other assessments of tax are being held, pending final determination of this cause. The printed brief of Appellants has not been furnished to us at this time (December 14, 1953), and this brief must be given to the printer now to be ready for filing by the time required by the rules of this Court.

Appellants say in their brief that "No express authority was necessary to appoint W.H.M.S. as the Navy's purchasing agent to the extent that it was" (no printed brief to give page). We think that is an erroneous statement. The Armed Services Procurement Act specifically designated and limited the delegation of purchasing power

under the Act. It provided that such delegation must be to another Navy officer, and specially prohibits any delegation of purchasing power in purchases of over $25,000. Congress has spoken on the question very clearly, and in the face of the very plain prohibition, the Navy attempts to delegate its power to purchase. The form of purchase order used is headed "PURCHASE ORDER" then follows "Navy Department, Bureau of Yards and Docks, By: Fishback & Moore of Texas, Inc." It directs that invoices must be mailed to the Contractor, Fishback & Moore, at Camden, Arkansas, and shipment to be made to "Officer-in-Charge of Construction, (no name given) c/o Fishback & Moore". On the reverse side, the last paragraph (not in the printed record) the following statement is found: "The amount of State or local sales, use, occupational, gross receipts, or other similar taxes or license fees imposed on the vendor or vendee by reason of this transaction is $..... The vendor or vendee, as the case may be, agrees upon direction of the United States to make appropriate claim for refund and in the event of any refund, to pay the amount thereof to the United States." The Gross Receipts Tax Law of Arkansas specifically provides that sales to contractors are sales for consumption and are taxable sales, and renders the retailer (Kern-Limerick) liable for the tax. Of course the amount of the tax is passed on to the Government or any other for which the merchandise is used, and this Court has held that the tax is insignificant, and merely incidental and does not amount to "a taxing of the Government". In the case at bar, it is a question of fact as to who is the purchaser, and the Arkansas Supreme Court held that W.H.M.S. was the purchaser, and that they were, therefore, liable for the tax.

Appellant has also discussed the incidence of the tax as falling on the purchaser, and that the retailer shall

pass the tax on to the consumer. That does not aid the appellant here. Since Kern-Limerick is the seller they owe the tax whether they collect it or not. W.H.M.S. consumes the merchandise in fulfilling their contract, and it is the duty of Kern-Limerick to collect it, but whether they collect the tax or not, they owe it to the State. A reading of the Gross Receipts Tax Act (Ark. Stat. 1947, Sec. 84-1903) will show that the tax is levied "upon the gross proceeds or gross receipts derived from all sales to any person * * *". Therefore the tax was levied upon Kern-Limerick and not upon W.H.M.S. The law provides that the seller shall collect it from the buyer, but the tax is never levied against the purchaser and not the seller. Act 487 of the Acts of 1949, Arkansas' Use Tax Act, Section 5 (a) and (b) levies the Use Tax as follows:

> Ark. Stats. Ann. 1947.—"Section 84-3105. Imposition and rate of tax—Extinguishment of liability.—
>
> (a) There is hereby levied and there shall be collected from every person in this State a tax or excise for the privilege of storing, using or consuming, within the State, any article of tangible personal property, after the passage and approval of this Act (§§84-3101—84-3128), purchased for storage, use or consumption in this State at the rate of two (2%) per cent of the sales price of such property. This tax will not apply with respect to the storage, use or consumption of any article of tangible personal property purchased, produced or manufactured outside this State until the transportation of such article has finally come to rest within this State or until such article has become commingled with the general mass of property of this State. This tax shall apply to the use, storage or consumption of every article of tangible personal property, except as hereinafter provided, irrespective of whether the article or similar articles are manufactured within the State of Arkansas or are

available for purchase within the State of Arkansas, and irrespective of any other condition.

(b) Every person storing, using or consuming in this State tangible personal property purchased from a vendor shall be liable for the tax imposed by this Act (§§84-3101—84-3128), and the liability shall not be extinguished until the tax has been paid to this State, but a receipt from a vendor authorized by the Commissioner under such rules and regulations as he may prescribe to collect the tax imposed hereby, given to the purchaser in accordance with the provisions of Section 7 (§84-3107) of this Act shall be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer."

This would seem to do away with Appellant's argument as to the incidence of the tax controlling the liability for the tax.

It will be remembered that, beginning in 1942, soon after this Court decided the *King-Boozer* case, Congress held hearings on the question of Sales Tax Liability and Exemption of Government Contractors. H.R. 6617 was before the House Ways and Means Committee. It required several days of hearings, and the proposed enactment to exempt such contractors was never passed. Congress realizes that the States have an economic problem, and have steadfastly refused to exempt such contractors from Sales Tax liability on Government contracts generally. The Naval authorities know that, for they attended the hearings and presented arguments for the resolution to exempt contractors from the tax. A number of cases have gone up to the Courts since the *King-Boozer* case, and since those hearings, and both Congress and this Court have continued to stand by the decision in that case. The question of delegation of power to purchase by designating a contractor as purchasing agent for the Government was not raised

or discussed by this Court in the *King-Boozer* case, nor in the hearings before the House Committee of Congress. As early as 1940 there was before Congress the very question of designating Government Contractors as agents of the United States Government. Amendment No. 120 was offered to H.R. 8438, the Naval Appropriation bill, and the amendment was as follows:

> "Provided, That all contractors who enter into contracts under the authority contained in this paragraph shall, in the discretion of the Secretary of the Navy, be held to be agents of the United States for the purpose of such contracts and all purchases under such contracts shall be exempt from Federal, State and local taxes."

The amendment was defeated. See Vol. 86, Part 7, pages 7518-19 and 7527-7535, Congressional Record of 76th Congress.

In the passage of the Atomic Energy Act of 1946, 60 Stat. 765, 42 U.S.C. Sec. 1809 (b) and Sec. 9 (b), the Congress spoke again and in the following language exempted all expenditures by contractors with the Atomic Energy Commission from the liability of the Sales Tax:

> "The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, County, Municipality, or any sub-division thereof."

The language was thought to be plain and the Courts in the case of *Carson* v. *Roane-Anderson, et al,* found in 192 Tenn. 150; 239 So. (2d) 27; 342 U.S. 232, promptly held the contractors not liable for the tax. Congress has again spoken and has repealed the above provision, thus leaving such contractors liable for the tax, approved August 13, 1953, in the following language:

"Section 9 (b) of the Atomic Energy Act of 1946 is amended by striking out the last sentence thereof."

See 83 Congressional Record, 1st Session, page 3966. Recent hearings in Congress attended and participated in by proponents and opponents of such taxes, have been held and Congress has very definitely spoken, and it would seem that the authority to tax Government contractors is settled. It would also seem that the Navy officers are not willing to follow the dictates of Congress. The Atomic Energy Act is the only Congressional Act that has attempted to give immunity to such contractors, and that must end now. Liability of such contractors generally has been affirmed by a vast majority of the Sales Tax States. The shortness of time for printing Appellee's brief and the State's facilities for printing forbids our having printed the Congressional Acts above referred to as an appendix, hereto.

We submit that the judgment of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted

O. T. WARD

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